No. 3073

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United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES P. DOE, claimant of the steamship "George W. Elder", her engines, etc.,
Appellant,

vs.

COLUMBIA CONTRACT COMPANY (a corporation), and UNITED STATES FIDELITY AND GUARANTY COMPANY, stipulators,
Appellees.

REPLY OF APPELLEE, COLUMBIA CONTRACT COMPANY, to Appellant's Additional Memorandum of Authorities.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
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McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellee, Columbia Contract Company.

PERNAU-WALSH PRINTING CO.

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Upon the argument, appellant cited three cases, not referred to in his brief, in support of his present contention that the "Elder" was not an overtaking vessel. Since then appellant has filed a reply brief wherein he again refers to them. Because these additional authorities were not cited prior to the argument, we, on behalf of appellee, requested and were granted permission to file a reply memorandum.

Despite the temptation to make the obvious answers to the matter appearing in appellant's reply brief we

shall confine ourselves to the law applicable to the case. Although the same contentions were made in his opening brief, it is significant to note that the appellant has again failed to offer any excuse or justification for the "Elder's" reckless navigation.

In the first case cited by appellant,

The John Rugge, 234 Fed. 861,

the tug "Rugge" and her tow were claimed to be overtaken vessels despite the fact that the tug was rounding to for the purpose of straightening out on her course. As found by the court she was merely "winding around to get on her course," after leaving the wharf with her burdensome tow. There is not a word in the court's opinion which indicates that the colliding vessel, *The Perth Amboy,* was coming up with the "Rugge" or her tow from any direction more than two points abaft their beam, or that the crew of the approaching vessel were unable to see either of the side lights of the "Rugge." In fact, such a situation is practically impossible with respect to a tug such as the "Rugge", leaving a wharf and maneuvering around to get on her course, towing a barge and three other boats in tandem style, in the narrow waters of the Arthur Kiel. Obviously, in the maneuvers of the burdened tug, all of her lights, as well as the lights on the tow, would be constantly changing. In fact, in the lower court it was contended that the vessels were on crossing courses. The decision has no application to the facts of the present case.

Appellant next cites

The Servia, 149 U. S. 144,

to the point that there are conditions not covered by the rules. There the vessel in collision

> "was backing out, stern foremost, from her berth in a slip in Jersey City."

The court's opinion upon the point to which it is cited by appellant is as follows (p. 686):

> "The statutory steering and sailing rules before referred to have little application to a vessel backing out of a slip before taking her course, but the case is rather one of 'special circumstances,' under Rule or Article 24 requiring each vessel to watch, and be guided by, the movements of the other."

Manifestly, the rule there announced is inapplicable to the facts of the present case.

The extremes to which appellant has gone in his unsuccessful efforts to have the "Elder" relieved from the effects of her reckless navigation is best evidenced by the next citation,

The Transfer No. 19, 194 Fed. 77,

a case so different from the present one that it hardly requires passing consideration. There the master of the tug "Gladiator," intending to dock at a slip, while approaching it put her helm aport and her engines at full speed astern. Unfortunately, he miscalculated the tug's headway and, as a result, she struck the pier so hard that he was thrown down, the wheel striking him and breaking both of his jaws, thereby rendering him unconscious. He remained in that state until after the collision which followed. In the meantime, the tug,

under a port helm, continued to go full speed astern, with no one in charge of her navigation, *in a semi-circle,* until the time of the collision. What possible support has such a decision upon appellant's contention that the "Kern" was not an overtaken vessel?

In not one of the cases cited* does it appear that the lights or bearings of the vessel run down remained in any steady or fixed position for any appreciable period of time. Obviously, with a vessel backing out of the slip, or maneuvering around to get on her course, or backing in a semi-circle full speed astern, her lights and bearings will be constantly changing, hence the situation thus presented is one of special circumstances and each vessel should act prudently.

The rules of navigation were enacted to prevent collisions, not to induce them. They come into operation when the need of precaution begins. As said by Judge Brown in

The Aurania, 29 Fed. 98-105,

in discussing overtaking vessels:

> "The rule applicable must depend upon the actual situation at the time when the necessity of precaution begins."

Applied to the facts of our case, it at once becomes apparent that the rule applicable is to be determined by the position in which the vessels were when the

*Appellant also cited *The William A. Jamieson*, 241 Fed. 950, to show the necessity of a lookout. The books are full of similar cases where vessels have been condemned for the want of a lookout. There the "Jamieson" did not have a lookout forward, both deckhands being at the stern of the vessel. The court recognized the rule that she should not be condemned unless the absence of a lookout contributed to the collision. Finding that such fault did contribute, it held her in fault.

"Elder" blew her first whistle, requesting permission to pass to the starboard of the vessel her officers saw ahead. Just prior to that time the "Kern" had come to a stop, it is true, but she was out in the middle of the river, on the same course she had for some time previously been pursuing, coming down the river, pointing directly down stream, with neither of her side lights visible to the "Elder." She came to a stop momentarily so as to make fast to the barges. In this respect her position is similar to a vessel, while on her course, momentarily stopping her engines and her headway without changing her bearings. She was not backing and filling at the time of the exchange of the first whistle, or any time thereafter, as stated by appellant.* Jensen, the assistant engineer, testified that for some *few minutes before* they had received the first signal from the "Elder" they were "going ahead and backing." But when the "Kern" reached the barges, which was prior to the time they received the "Elder's" first whistle, he stopped the engine. (Ap. 241.)

Upon the visibility of the "Kern's" side lights little need be added to what we said in the brief (pp. 12-15) previously filed. The admissions made in the lower court, forced out of appellant by the testimony introduced as well as the evidence of the physical damage suffered by the "Kern" cannot now be withdrawn. In fact, everybody in the lower court conceded that the

* Appellant's comments about the lashed wheel of the "Kern" bespeak an unfamiliarity with navigation. The lash is a mere line with a loop on one end which is usually placed around one of the spokes of the ship's wheel. It is frequently used on all vessels when the wheel is kept at steady.

"Elder" was coming up with the "Kern" from a position directly astern more than two points abaft the latter's beam, that is, in such a position, with reference to the "Kern" that *she was unable to see either of her side lights.* Even appellant's present proctors, despite their criticism of the admissions made in the court below, find themselves unconsciously admitting the same fact. On page 3 of their brief they state the fact as follows:

> "The Kern was lying up and down stream previous to the collision, *her side lights invisible to the Elder.*"

What did that indicate to Pilot Patterson? It indicated to him, as his action in blowing a one blast whistle under Rule 8 of Article 18 requesting permission to pass an *overtaken vessel* conclusively demonstrates, that the vessel ahead was pointing ahead in the same direction in which he was going—that he was "coming up with another vessel" from astern and that he was in such a position and coming from such a direction that he was "unable to see either of that vessel's side lights." He knew, and every other navigator similarly situated would know, that the "Kern" was an overtaken vessel. As said by Judge Brown, in

The Aurania, supra,

in discussing this general question:

> "The terms used in the rules are, moreover, used in the nautical sense, and must be applied as seamen are wont to apply them."

Pilot Patterson's actions at the time he blew the first and second whistle speak more emphatically than can we of the rules governing the two vessels.

A collision arising under the International Rules of 1880, where the overtaken vessel was *at rest upon the water,* was presented to the Probate Division in

The Imbro, 14 P. 73.

There the "Poseidon" was lying *becalmed* off Dungeness. She was heading to the northward and westward, *without steerageway.* The "Imbro" was approaching, the navigating officer of the latter observing her lights, which he mistook for the lights of different vessels. Without taking any precautions to prevent a collision until he got so close that a collision was unavoidable, he approached and struck the vessel ahead lying motionless in the water. After condemning the "Imbro' for such conduct, which in the opinion of the court was "reckless and negligent navigation," it proceeded to ascertain whether the "Poseidon" was also in fault because of its failure to show to the "Imbro" the light required by Article 11 of the international regulations, in effect at the time of the collision, to be shown by *an overtaken vessel.* Before considering the alleged fault of the "Poseidon," however, the court deemed it material to determine what an overtaking vessel was. And despite the fact that the "Poseidon" was *not moving* through the water, the court found that she was *an overtaken vessel,* saying:

> "In my opinion a vessel approaching another from aft, and being more than two points abaft the beam of the foremost ship—a position from which the coloured side lights of the foremost vessel would not be visible—is an overtaking vessel. * * * "

The definition of an overtaking vessel so uniformly adopted by the courts* is now embodied in Article 24 of the International and Inland Rules.

That article does not say, as appellant would have it read, that every vessel coming up with another vessel is an overtaking vessel provided the vessel ahead is actually running in the same direction. On the contrary, it plainly provides that:

> "Every vessel coming up with another vessel * * * in such a position with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel."

Every vessel coming within that definition, and concededly the "Elder" does upon the testimony and admissions heretofore pointed out, is an overtaking vessel, regardless of the question as to whether the vessel being overtaken is running in the same direction, becalmed, stopped or merely under way within the meaning of the rules, in which latter situation we now proceed to place the "Kern."

The "Kern" Was Under Way.

The navigation rules, as pointed out in our opening brief, provide that a vessel is under way within their meaning "when she is not at anchor or made fast to the shore or aground."

Act of June 7, 1897, 30 Stat. 96.

Appellant, however, takes issue with us upon this question and in so doing takes the position that the

*See *The Main*, 11 P. 132; *State of Alabama*, 17 Fed. 847; *The Aurania*, 29 Fed. 98.

"Kern" was *not under way.* We shall later show where such contention leads appellant, but for the present shall attempt to point out the fallacy of his argument.

The "Kern" was not at anchor, she was not made fast to the shore and she was not aground. Consequently she, within the meaning of the rules, was under way. The courts have so ruled in passing upon other vessels similarly situated. They could not do otherwise where a vessel comes, as does the "Kern," directly within the mandatory provisions of the statute.

The court followed the plain language of the statute in

The Nimrod, 173 Fed. 520,

where it said:

> "And a vessel, even though her headway is killed in the water, is considered under way, unless she is at anchor, or tied to the shore or aground."

This court expressly recognized the application of the rules to a vessel situated somewhat similarly to the "Kern" in

The Ruth, 186 Fed. 87.

There it was contended that the "Ruth" was not under way, but that she was a vessel at rest as fully as if she had been at anchor. The court rejected the contention and held that as she was not at anchor or made fast to the shore or ground, she was a vessel "under way within" the meaning of the navigation rules.

In

Hughes on Admiralty, p. 216,

the author says:

> "So, too, in order to avoid any possible misunderstanding, a vessel, even though her headway is killed in the water, is considered under way, unless she is at anchor, or tied to the shore, or aground. The reason is that, unless she is thus fastened to something, a turn of her engines may put her under way, and therefore she should be avoided."

See also

The Aurelia, 183 Fed. 341.

Following appellant's contention one step further, it at once becomes apparent that he would have the "Kern" a vessel at rest and, although not at anchor, entitled to the rights of a vessel in that situation. The "Kern's" engine was stopped (Ap. 241) before and at the time when the "Elder" blew her first whistle, and so remained until a short period of time before the collision.* She was, therefore, entitled to protection from a vessel approaching her at such a rapid rate of speed that when the approaching vessel reversed her engine, she was unable to stop before striking her with such force that she cut twelve feet into her to within ten inches of the center line of her main deck. The "Elder" saw her over half a mile away. The navigating officers of appellant's vessel, in the opinion of the court below,

*Her movement then to avoid a collision was admitted to be and obviously was an act *in extremis.* (Ap. 228.)

> "knew the river, and knew also that the 'Kern' was engaged in navigating barges down stream * * * and
>
> "knew that the 'Kern' and 'Hercules' were in the habit of exchanging tows in the river * * * and ought to have known that the 'Kern' was likely to be engaged in the very thing that she was trying to do at the time." (Ap. 60.)

Despite this knowledge, she continued negligently on her course without taking a single precaution to avoid the vessel ahead until it was too late to avoid a collision. Such reckless navigation cannot be successfully defended.

In

The Col. John F. Gaynor, 130 Fed. 856,

while the steamer was motionless waiting to pick up a quarantine physician, she was observed by those on board the tug at a time when the latter, approaching the steamer, was a considerable distance away. Nevertheless the tug so maneuvered her tow that it collided with the steamer. In holding the tug at fault, the court said:

> "The steamship * * * though not exactly in the situation of a ship at anchor, had to a large extent, the rights of a ship at rest, in regard to the movements of a passing vessel."

The Circuit Court of Appeals for the Second Circuit in

Britain S. S. Co. v. J. B. King Transp. Co., 131 Fed. 62,

likewise condemned an approaching vessel for colliding with a steamer not moving through the water, the court saying:

> "The steamer was practically a vessel not under way, was seen to be such by the navigators of the tug, and *was so seen at a distance amply sufficient* to enable the latter to avoid collision. * * * "

Both of these decisions were cited with approval by this court in

The Ruth, supra.

In

The Lucille, 169 Fed. 719, the court said:

> "The situation of a vessel at rest upon the water, but not anchored, is analogous to that of a vessel at anchor or moored, and the duty of avoiding it is wholly upon the vessel in motion. Spencer on Marine Collisions, Secs. 116, 117, 120, and numerous authorities cited on page 257."

The "Kern," under these authorities, was entitled to the rights and privileges of a vessel at anchor. In view of the admitted fact that the pilot and officers of the "Elder" knew of the presence of the "Kern" when at a considerable distance away, it was their duty, even upon this theory, to take proper precautions to avoid the "Kern." They failed in this duty with the result that the "Elder" crashed into her and thus caused her to sink immediately.

Upon such a state of facts, we submit, the elementary rule, so frequently announced, that a moving vessel must avoid one at anchor, is applicable and that she is liable for all injuries caused by a collision which might have been avoided by the exercise on her part of due care and precaution. Having collided with a vessel entitled to the privileges of one at anchor, the

burden of proof, upon familiar principles, is upon her to show that she was free from fault.* The same burden, as we pointed out in our reply brief, also rests upon her as an overtaking vessel. She has not sustained the burden. In fact, appellant has not offered an excuse for his vessel's reckless navigation. The reason is apparent; such navigation cannot be successfully defended. The collision could have been avoided if the "Elder" had exercised ordinary care, or if she had taken the proper or any precautions to avoid the "Kern." Her failure so to do was the sole cause of the collision. Consequently, the decree of the lower court should be affirmed in all respects with the directions previously requested in our former brief.

Dated, San Francisco,
March 6, 1918.

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The Clara Clarita, 23 Wall. 1; 23 L. ed. 146-9;
The Virginia Ehrman, 97 U. S. 309; 24 L. ed. 890;
The Lucille, 169 Fed. 719.